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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Thirty-third session

SUMMARY RECORD (PARTIAL)* OF THE 676th MEETING

Held at Headquarters, New York,
on Monday, 12 June 2000, at 10 a.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

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* No summary record was provided for the first part of the meeting.

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The meeting was called to order at 10.45 a.m.

The discussion covered in the summary record began at 11.30 a.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (A/CN.9/466, 470, 472 and Add.1-4)

1. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the Group's report on the work of its thirty-first session was contained in document A/CN.9/466; the text of the draft Convention as adopted by the Working Group was annexed to the report. As requested by the Commission, the Secretariat had prepared an analytical commentary on the draft Convention, which could be found in document A/CN.9/470. The text used for the commentary was the text adopted by the Working Group, with minor editorial changes. As requested by the Working Group, the Secretariat had circulated the text of the draft Convention to Governments and international organizations; the comments received had been issued in documents A/CN.9/472 and Add.1-4.

2. The Commission might wish to begin by considering issues which had been identified by the Working Group as the most important pending issues. It could first address the issue of the scope of application, in particular the question of assignment of receivables other than trade receivables. Another very important issue was the definition of the term "location", which was defined in article 6, subparagraph (i), and would need to be considered also in connection with articles 24 to 27. Once the Commission had addressed those issues, it could take up the articles of the draft Convention in numerical order. The Commission would need to decide whether the final adoption of the draft Convention should take place in the General Assembly or at a diplomatic conference.

3. The CHAIRMAN said that it was implicit in the suggestion by the Secretariat that the Commission would defer consideration of the title and preamble of the draft Convention until after it had considered the substantive articles.

4. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the Working Group had focused on receivables arising from the sale of goods or the provision of services (trade receivables). It had become clear that a number of other types of receivable could appropriately be included in the scope of the draft Convention, including consumer receivables arising from transactions for personal, family or household purposes, receivables owed by consumers, and receivables arising from a variety of financial transactions including swaps, derivatives, payment and security settlement systems, letters of credit, deposit accounts, and so forth. The Working Group had felt, however, that those other types of receivables would need special treatment: either certain issues addressed in the draft Convention should be addressed in a different way, or the assignment of such receivables should be excluded altogether on the grounds that they were subject to sufficient regulation and might not need additional regulation in the draft Convention.

5. The result of the Working Group's deliberations was reflected in the two variants of article 5 of the draft Convention. Variant A reflected a narrow

exclusion, and variant B a broader exclusion. Under variant A, the assignment would still remain valid as between the assignor and the assignee, but its effects as against the debtor would be left to the law applicable outside the draft Convention; under variant B, the validity of an assignment would be left altogether to the law applicable outside the draft Convention. A further difference between the two variants was the inclusion of paragraph 2 in variant A; the reason was that, once the debtor was protected, under paragraph 1, he would not need to have the right to terminate the original contract.

6. The comments made by industry representatives, reproduced in document A/CN.9/472 and Add.1-4, included a third suggestion which was an amended version of variant B. Under that amendment, unless the debtor consented, articles 11 and 12 would apply only to assignments of trade receivables. If articles 11 and 12 did not apply, the validity of the assignment would be left to be determined by applicable law; if it was determined to be invalid, the rest of the draft Convention would not apply.

7. The draft Convention did not address, and could not address, the form of the underlying contract: whether it needed to be in writing, and whether an assignment clause that was an oral agreement would need to be honoured in the same way as any other oral agreement between participants in financial arrangements under current law.

8. In the communications received by the Secretariat, reference had been made to other types of receivable, such as deposit accounts, which might need to be treated in the same way.

9. Mr. MORÁN BOVIO (Spain) said that his delegation's chief difficulty with variant B was the reference to the rules of private international law, which might be an obstacle in determining the applicable regime. With the addition proposed by the European Banking Federation and reproduced in document A/CN.9/472/Add.1, variant B was very similar to variant A; however, variant A had the advantage of being fuller and clearer, and was therefore preferable.

10. Mr. FERRARI (Italy) said that, if the Commission opted for variant B, it would have to retain the reference to the rules of private international law.

11. Mr. DUCAROIR (Observer for the European Banking Federation) noted that the proposal made by the European Banking Federation (EBF) and other international organizations was a global proposal from the banking and financial industry. In response to the comment by the Spanish delegation, he noted that the words "in conformity with the law applicable by virtue of the rules of private international law" had not been suggested by EBF but had been part of the initial text proposed by the Canadian delegation.

12. The banking and financial industry had at first requested the exclusion of financial receivables from the scope of the Convention, but the Working Group had not shared that opinion and had not wished to narrow the scope of the Convention. Noting that decision of principle, which seemed irrevocable, the banking and financial industry wished for a particular regime to be applied to those receivables, within the Convention, in view of the constraints described

in the comments from EBF, as well as in the comments of the International Swaps and Derivatives Association (ISDA) and the Financial Markets Lawyers Group.

13. Variant A was interesting, but introduced an element of uncertainty. Given the existence of different legal regimes, particularly in European countries, it was difficult to see how an assignment could be valid as between the assignor and the assignee, when there were no effects against the debtor. The Federation therefore preferred variant B, which provided for the exclusion of financial receivables, referred to in the document as receivables other than trade receivables, from the application of articles 11 and 12 of the Convention. Variant B also proposed their exclusion from chapter IV, section II, but that seemed unnecessary: if articles 11 and 12 did not apply, there was no reason to be concerned about chapter IV, section II. However, in its present form, the text went too far. Rather than revising variant B, he hoped that it would be possible to review article 6 to amend the definition of "trade receivable" and to add three further definitions, as set out in document A/CN.9/472/Add.1.

14. Mr. BURMAN (United States of America) said that the issue of scope was perhaps the most significant issue relating to the draft Convention. Having conferred with many industry and financial groups in his country, his delegation's general conclusion had been that the draft Convention rules had the greatest impact and worked very well when the receivable related to the sale or lease of goods or another kind of trade or commercial receivable. However, in the case of financial receivables, the Convention rules did not work so well, because transactions relating to financial receivables often took place under industry rules, and any assignments of those receivables were specially structured among sophisticated players. His delegation therefore supported the approach advocated by EBF, which was to formulate a definition to cover those receivables to which all the rules should apply, namely the trade receivables that were the core area where the draft Convention would have its greatest impact, and then to focus on articles 11 and 12. It could be that, within those core receivables, some consideration should be given to cases where there was an anti-assignment clause, but in other cases articles 11 and 12 worked very well. The most likely candidate for exclusion from articles 11 and 12 would be a receivable arising from a loan of money.

15. His delegation had changed its position because it had listened to the comments of other delegations, and of the industry, and had also learned of some fairly sophisticated problems that could arise if some financial receivables were included within the rules of the draft Convention. It was prepared to discuss those problems at the appropriate time, and could also make a specific proposal in writing. However, its overall conclusion was that the definition of receivables should be narrowed, and that some specific exclusions might be necessary.

16. Mr. MEENA (India) said the draft Convention provided that instructions in respect of receivables should not change the currency of payment specified in the original contract, or change the State in which the payment was to be made, to a State other than that in which the debtor was located. Thus it seemed to be in conformity with the exchange control regulations. However, the draft Convention was not applicable to the financing of domestic receivables. Therefore its provisions needed to be examined with regard to action-control

regulations. Assets based on securities which generally lacked volatility would acquire the desired mobility by trade in international receivables in the manner suggested in the draft Convention. Such a convention was long overdue and, in the context of the expansion of international trade, would have a significant and effective role to play in the assignment of receivables on an international basis. It would be an appropriate and effective instrument for achieving progress towards a new formula in that area. It would improve assignability and enhance international trade and finance by making credit available at lower cost.

17. His delegation therefore supported the draft Convention currently under discussion. However, the rules of assignment of receivables had social and political ramifications, which deserved serious consideration.

18. With those preliminary observations, and without prejudice to its right to offer detailed comments, his delegation hoped that the draft Convention would be acceptable to all concerned. With regard to the limitations on receivables other than trade receivables under article 5, India supported variant B.

19. Mr. WHITELEY (United Kingdom) supported the modified version of variant B proposed by EBF. He agreed with the Italian delegation that it was difficult to avoid reference to the rules of private international law in terms of determining certain issues under article 5, and in fact paragraph 53 of the analytical commentary indicated that under variant A it would still be necessary to refer to laws applicable outside the Convention. The United Kingdom was concerned that those laws might themselves have an adverse effect on the debtor's interest if the assignment was recognized as between the assignor and the assignee. In such cases, as far as the laws of the United Kingdom were concerned, the debtor would lose many of the protections to which it would otherwise be entitled.

20. Mr. STOUFFLET (France) said that, in its consideration of articles 1 to 5 on scope, the Commission had naturally come to focus on the problem of financial receivables. However, some other important issues remained open. In regard to the scope of application of the future Convention, the French Government and others had drawn attention in their comments to the case of non-contractual receivables and he would revert to that issue at a later stage.

21. With regard to financial receivables, his delegation preferred variant B, mainly because it allowed the broadest possible scope of application for the draft Convention. In that context, the French delegation also supported the suggestion from EBF which highlighted the true raison d'être of variant B, namely protecting mechanisms for collective-type settlements. Emphasizing the reason underlying the exception was a major merit of the proposal. The specific wording might require further consideration, but the concept fully met the concerns of his delegation.

22. Mr. RENGER (Germany) said that his delegation preferred article 5, variant B, in the version contained in document A/CN.9/470. Moreover, it would prefer the text of variant B to remain unchanged: the amendment proposed by EBF ("unless the debtor consents ...") was ambiguous.

23. While his delegation was generally in favour of the Federation's proposed amendment to article 6 (1), he suggested that the words "for the sale or lease of goods or the provision of services" should be deleted since some types of contract to be covered under the article - for example, construction contracts - would otherwise be excluded.

24. Mr. DOYLE (Observer for Ireland) said that, like the representative of Germany, he preferred variant B in the version contained in document A/CN.9/470.

25. Mr. DUCAROIR (Observer for the European Banking Federation) said that the proposed amendment to draft article 5 reflected the desire of the Working Group on International Contract Practices and of the Commission to remove unnecessary limitations on the draft Convention's scope of application. However, the wording of the amendment was misleading; it appeared to further limit the application of articles 11 and 12, whereas the intention had been to expand the scope of those articles as much as possible. He suggested that the problem should be referred to the drafting group.

26. He had no objection to the German representative's suggestion for the further amendment of article 6 (1). The primary purpose of the amendment proposed by EBF had been to establish a general regime for trade receivables and a specific regime for financial receivables, which could be defined in greater detail if delegations wished.

27. The CHAIRMAN suggested that the problem should be referred to the drafting group.

28. Mr. SCHNEIDER (Germany) said that it was not always possible to make a clear distinction between substantive issues and drafting problems, but that he was prepared to accept the Chairman's suggestion.

29. Mr. SMITH (United States of America) said that, while he agreed that there was general consensus at the level of policy, various issues required further consideration.

30. The common view seemed to be that all provisions of the draft Convention should apply to trade receivables, however defined. The question then was what rules applied to receivables other than trade receivables. Under variant B, in the case of receivables other than trade receivables, if the underlying contract contained an anti-assignment clause, articles 11 and 12 of the Convention did not apply.

31. However, variant B might prove inadequate in certain cases. If articles 11 and 12 did not apply owing to the existence of an anti-assignment clause, domestic law would prevail; however, anti-assignment clauses were not enforceable under some national legal systems, in which case the provisions of the draft Convention that governed relations between assignor and assignee would apply. Moreover, even in States where anti-assignment clauses were enforceable, the effect of making an assignment despite the existence of such a clause might vary from State to State; it might prevent the assignment from becoming effective or enable the debtor to claim breach of the clause itself.

32. The Commission should consider whether the choice of law rules embodied in the draft Convention should give priority to the jurisdiction of the assignor in such cases or, if the financial receivable was a claim against a broker or a depositary bank, whether the choice of law rule should rather be the location of the debtor, as was the case in some jurisdictions and as was rapidly becoming the modern rule in the case of investment securities. If the Commission concluded that assignment should be effective even in the presence of an anti-assignment clause, it must also decide whether that fact would affect the debtor's right to set off mutual rights and obligations as provided under the legislation of certain States. His delegation also had grave doubts as to the warranty and substantive law proceeds provisions in such situations. The Commission might therefore need to establish specifying exclusions for certain receivables, other than trade receivables.

33. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that draft article 6 (1) was based on the assumption that, where the application of articles 11 and 12 of the draft Convention was excluded, the validity of any anti-assignment clause would be a matter of party autonomy. However, that presumed well-structured financial arrangements between sophisticated parties capable of protecting their own rights; the Commission might wish to provide further protection against adverse effects arising from application of the Convention.

34. The Commission should also consider what effect would be produced by deletion of the words "Unless the debtor consents" from the European Banking Federation's proposed amendment to draft article 5. Of course, the draft Convention would not affect the assignment arrangements contained in the original contract agreed to by assignor and debtor. However, the assignor must consent to any arrangements between assignee and debtor that affected the original contract. The question was whether the Convention should establish whether debtors could waive the protection to which they were entitled under an assignment clause, even where national law allowed them to do so.

35. The problem posed by the definition of trade receivables might be resolved by redrafting the text, replacing "for the sale or lease of goods or the provision of services" with "for the supply of goods, works or services".

36. Thus, apart from the issue of the assignment clause, the Commission might consider the potential for any other untoward effects of the draft Convention on the rights of debtors or third parties; the question of a debtor's right to change the assignment arrangements through negotiation with the assignor or the assignee; the possibility of revising the definition of trade receivables; and the issue of whether references to payments or security settlement systems and receivables arising under financial contracts governed by netting agreements or used as collateral were appropriately included in such a definition in the context of a multilateral treaty.

The meeting rose at 1.05 p.m.